

**JUDICIAL COUNCIL OF CALIFORNIA  
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue  
San Francisco, California 94102-3688

**Report**

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee  
Justice Joyce L. Kennard, Chair  
Heather Anderson, Senior Attorney, 415-865-7691

DATE: August 7, 2003

SUBJECT: Appellate Procedure: Clarify Time Frame for Ordering Review on  
Supreme Court's Own Motion (amend Cal. Rules of Court, rule  
28.2(d)) (Action Required)

Issue Statement

Rule 28.2(d) does not clearly indicate the time within which the Supreme Court may order review on its own motion in cases in which a party has filed a petition for review.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2004, amend rule 28.2(d) to clarify that when the Supreme Court decides to deny a petition for review but nevertheless to order review on its own motion, it may so order within the time period in which it has jurisdiction to grant the petition.

The text of the amended rule 28.2 is attached at pages 3-4.

Rationale for Recommendation

Subdivision (d) of rule 28.2 is ambiguous in prescribing the time within which the Supreme Court may order review on its own motion in cases in which a party has filed a petition for review. The court occasionally decides to deny a petition for review but nevertheless to order review on its own motion—for example, when the party seeks review only on an issue that the court deems unworthy of review but fails to seek review on an issue that the court does wish to reach. The court has consistently construed the rule to allow it to deny such a petition but order review on its own motion within the time in which it could grant the petition. This

amendment would adopt that construction and clarify that the court may order such review within the time period in which it has jurisdiction to grant the petition for review, i.e., within a total of 90 days after the petition is filed.

The amendment would also reorganize certain provisions of the rule into a more logical sequence.

#### Alternative Actions Considered

No alternative actions were considered.

#### Comments From Interested Parties

These proposed amendments were circulated as part of the spring 2003 comment process. Three individuals or organizations submitted comments about this proposal. Two of these commentators agreed with the proposal without suggesting any changes and the third took no position on the proposal.<sup>1</sup>

#### Implementation Requirements and Costs

Implementing this proposal is not expected to impose any requirements or costs on litigants or the courts.

#### Attachments

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<sup>1</sup> The full text of the comments that were submitted and the committee responses to these comments is set forth on the comment chart, attached at page 6.

Rule 28.2 of the California Rules of Court is amended, effective January 1, 2004, to read:

**Rule 28.2. Ordering review**

**(a) \* \* \***

**(b) Determination of petition**

(1) The court may order review within 60 days after the last petition for review is filed. Before the 60-day period or any extension expires, the court may order one or more extensions to a date not later than 90 days after the last petition is filed.

~~(2) — An order granting review must be signed by at least four justices; an order denying review may be signed by the Chief Justice alone.~~

~~(3)~~(2) If the court does not rule on the petition within the time allowed by (1), the petition is deemed denied.

**~~(c) — Grant and hold~~**

~~On or after granting review, the court may order action in the matter deferred until the court disposes of another matter or pending further order of the court.~~

**~~(d)~~(c) Review on the court's own motion**

(1) ~~In any case,~~ If no petition for review is filed, the Supreme Court may, on its own motion, order review of a Court of Appeal decision within 30 days after the decision is final in that court. Before the 30-day period or any extension expires, the Supreme Court may order one or more extensions to a date not later than 90 days after the decision is final in the Court of Appeal. If any such period ends on a day on which the clerk's office is closed, the court may order review on its own motion on the next day the clerk's office is open.

(2) If a petition for review is filed, the Supreme Court may deny the petition but order review on its own motion within the periods prescribed in (b)(1).

1 **(d) Order; grant and hold**

2  
3 (1) An order granting review must be signed by at least four justices; an  
4 order denying review may be signed by the Chief Justice alone.

5  
6 (2) On or after granting review, the court may order action in the matter  
7 deferred until the court disposes of another matter or pending further  
8 order of the court.

9  
10 **Advisory Committee Comment ~~(2003)~~(2004)**

11  
12 New rule 28.2 collects in one rule provisions of former rules 28 and 29.2  
13 governing the transmittal of the record on petition for review, the time within  
14 which the Supreme Court may grant or deny review, “grant and hold” orders, and  
15 ordering review on the court’s own motion.

16  
17 **Subdivision (a).** Subdivision (a) of new rule 28.2 simplifies a provision of  
18 former rule 28(b) by directing the Court of Appeal clerk to send “the record” to  
19 the Supreme Court; further specification is unnecessary. The subdivision also  
20 deletes as unnecessary micromanagement the former directive to the Supreme  
21 Court clerk to retain and renumber that record if review is granted.

22  
23 **Subdivision (b).** Former rule 28(a)(2) authorized the Supreme Court to  
24 grant review within 60 days after the filing of the last “timely” petition for review,  
25 but the word “timely” was both ambiguous and superfluous. The Supreme Court  
26 deems the 60-day period to begin on the filing date of the last petition for review  
27 that either (1) is timely in the sense that it is filed within the rule time for such  
28 petitions (i.e., 10 days after finality of the Court of Appeal decision) or (2) is  
29 *treated* as timely—although presented for filing after expiration of the rule time—  
30 in the sense that it is filed with permission of the Chief Justice on a showing of  
31 good cause for relief from default (former rule 45(c), now revised rule 28(e)(2)).  
32 In each circumstance it is the *filing* of the petition that triggers the 60-day period.  
33 New rule 28.2(b) therefore deletes the word “timely”; no substantive change is  
34 intended.

35  
36 **Subdivision (c).** ~~Subdivision (c) of new rule 28.2 is former rule 29.2(c).~~  
37 ~~Its wording has been conformed to current Supreme Court practice; no substantive~~  
38 ~~change is intended.~~

39  
40 **Subdivision ~~(d)~~(c).** Subdivision ~~(d)~~(c) of new rule 28.2 is former rule  
41 28(a)(1), authorizing orders of review on the Supreme Court’s own motion. The  
42 former provision, however, apparently assumed the court would exercise this  
43 authority only in cases in which “no petition for review is filed.” The assumption

1 was not prima facie unreasonable, but in practice the court may occasionally wish  
2 to order review on its own motion even when a party has petitioned for review—  
3 for example, in a case in which the party seeks review only on an issue that the  
4 court deems unworthy of review and fails to seek review on an issue that the court  
5 does wish to consider. To fill this gap, subdivision ~~(d)~~(c)(2) simply expressly  
6 authorizes the court in such a case to “deny the petition but order review on its  
7 own motion in any case.” within the periods prescribed in subdivision (b)(1), i.e.,  
8 during the time that it has jurisdiction to grant the petition for review.

9  
10 **Subdivision (d).** Subdivision (d)(2) of new rule 28.2 is former rule 29.2(c).  
11 Its wording has been conformed to current Supreme Court practice; no substantive  
12 change is intended.  
13

**SPR03-06**

Appellate Procedure: Time for Ordering Review on Supreme Court's Own Motion  
(amend Cal. Rules of Court, rule 28.2)

	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Gloria Barnes Legal Process Clerk Superior Court of Santa Cruz County	A	N	No comment.	No response required.
2.	Mr. Saul Bercovitch State Bar of California Appellate Court Committee		N	The Committee takes no position on this proposal, which would clarify the amount of time the Supreme Court has for ordering review when a petition for review has been filed but the Court orders review on an issue or issues different from those raised in the petition. The Committee is of the view that this is an internal matter for the Supreme Court.	No response required.
3.	Mr. Robert Gerard President Orange County Bar Association	A	Y	No comment.	No response required.